APPENDIX "A"

United States Court of Appeals For the First Circuit

No. 5509

INTERNATIONAL TYPOGRAPHICAL UNION LOCAL 38, AFL-CIO AND INTERNATIONAL TYPOGRAPHICAL UNION LOCAL 165, AFL-CIO AND ITS SCALE COMMITTEE, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 5510

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On petitions to review and set aside and on cross-petitions to enforce an order of the National Labor Relations Board.

Before WOODBURY, *Chief Judge*, HARTIGAN, *Circuit Judge*, and WYZANSKI, *District Judge*.

Opinion of the Court.

May 10, 1960

WOODBURY, *Chief Judge*. The Haverhill Gazette Company and the Worcester Telegram Publishing Company, Inc., Haverhill and Worcester or collectively the employers hereinafter, are and for years have been engaged in the

business of publishing daily newspapers in their respective Massachusetts communities. Both subscribe to interstate news services, advertise nationally sold products and enjoy annual gross revenues from their publishing operations in excess of $500,000. For a great many years the composing room employees, that is to say the printers, of Haverhill have been represented by Local 38 and the composing room employees of Worcester have been represented by Local 165 of International Typographical Union, AFL-CIO. Preexisting contracts between Haverhill and Worcester and the local unions representing their composing room employees having in each instance long expired, and in each instance attempts to negotiate new agreements having come to naught, strikes of the composing room employees of both employers ensued. At this juncture, on separate charges filed by Haverhill and Worcester, General Counsel for the National Labor Relations Board on February 6, 1958, filed separate complaints against the parent union, ITU hereinafter, and the local involved in each situation[1] alleging that the respondents had been and were engaging in various acts and conduct in violation of the Labor Management Relations Act, 1947, 29 U.S.C. § 141 *et seq.*, 61 Stat. 136, as amended. The cases were consolidated for hearing by order of the Regional Director and hearings in the Worcester case were held in Worcester by a trial examiner in April, 1958. At those hearings evidence was introduced and counsel stipulated for the incorporation in the record in that case of the testimony of the president of ITU adduced in the New York Mailers Case, so called, Board Nos. 2-CB-4967, 2-CB-1769 and 2-CB-1807, and of the testimony in a proceeding under § 10(k) of the Act between ITU and Worcester. Counsel also stipulated that the record in a proceeding in the United States District Court for the District of Massachusetts for an injunction under § 10(j) of the Act entitled *Alpert*

[1] Included in the complaint issued on Worcester's charge are also the Executive Council of ITU and the Scale Committee of Local 165.

v. *ITU*, 161 F. Supp. 427 (D.C. Mass. 1958), should constitute the record in the Haverhill case.

On the evidence before him in both cases the trial examiner found that the respondents had engaged and were engaging in some of the unfair labor practices charged against them in the complaints but had not and were not engaging in others, and recommended an order which he thought appropriate to his findings. Exceptions to the trial examiner's intermediate report, with supporting briefs, were filed by the respondents but the Board, with an exception to be noted hereinafter, affirmed the trial examiner and adopted his findings, conclusions and recommendations as its own. The respondents thereupon filed a petition in this court to review that order and set it aside and the Board countered with a petition for enforcement of its order.

There is little dispute over the facts, and the facts and issues in both cases are essentially the same. In both cases protracted negotiations for new collective bargaining agreements, in which officers of ITU participated with representatives of the local unions and officials of the New England Daily Newspaper Association, Inc., participated with the employers, finally broke down and in consequence late in November, 1957, the locals with ITU sanction and approval called the composing room employees of both employers out on strike. In each instance the bones of contention were much the same. The representatives of the local unions backed by the representatives of ITU adamantly insisted upon the inclusion of three clauses in any new contract and the representatives of the employers as adamantly insisted that the clauses were illegal and that no contract would be entered into in which the clauses were included. Moreover, regarding inclusion of the clauses as "key" issues both the employers' and the unions' representatives declined seriously to explore economic issues

such as hours, overtime, pensions, summer holidays,[2] etc., until agreement should be reached on the clauses they regarded as crucial.

The three clauses on which the negotiators deadlocked were the jurisdiction, foreman[3] and general laws clauses which may as well be briefly described at this point.

The jurisdiction clause, on which the unions in both instances insisted, covered persons engaging in a number of new processes and operations, in addition to those covered by the jurisdiction clauses of the old contracts, which new processes and operations the unions considered substitutes for the processes and operations traditionally performed in the composing room by printers but which, with two exceptions, the employers were not using and did not contemplate installing in their plants.[4] The foreman clause provided that the composing room foreman, who had the power to hire, fire and process grievances, had[5] to be a member of the union although he would be exempt under certain circumstances from union discipline for activities on behalf of management. The general laws clauses provided that the General Laws of the International Typographical Union in effect on January 1, 1956 (or in another version at the time a contract was signed), if not in conflict with state or federal law, should govern relations between the

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[2] During the negotiations Worcester and Haverhill with the approval of the unions voluntarily granted their composing room employees an increase in wages.

[3] Haverhill did not consider the foreman clause a "key" issue.

[4] The new jurisdiction clause covered "paste-makeup" operations which at Worcester's plant had for many years been performed by artists who did not work in the composing room and had never been represented by Local 165. And it covered an operation or process involving the use of tape which Haverhill was using only experimentally.

[5] The employers did not object to a union man being foreman. Indeed their foremen were union men. Their objection was to the requirement that their foreman *had* to be members of the Union.

parties on those subjects concerning which no provision was made in the contracts.

The trial examiner found that the unions were genuinely desirous of securing contracts with Worcester and Haverhill but that the evidence clearly showed that they insisted upon the acceptance of the jurisdiction, foreman and general laws clauses as written as a condition precedent to the execution of any collective bargaining agreements. But, believing the clauses illegal, the examiner concluded that by insisting that the employers agree to them the unions had refused to bargain collectively with the employers in violation of § 8(b)(3) of the Labor Management Relations Act, 1947.[6] He also found that the primary object or purpose of the strikes called by the unions and their agents against the employers was to force the latter to accede to the unions' demand for inclusion of the three clauses he thought illegal and from that finding concluded that the unions had violated § 8(b)(2)[7] of the Act in that they had attempted to cause the employers to encourage union membership by discrimination in regard to hire, tenure, terms or conditions of employment. As to the foreman clause, he thought they had also attempted to

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[6] "It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a) of this title; . . . ."

[7] "It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ," which in pertinent part provides:

"It shall be an unfair labor practice for an employer—

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."

coerce the employers in the selection of their representatives for the purpose of adjusting grievances in violation of § 8(b)(1)(B) to be considered hereinafter.

The Jurisdiction Clause

The Board neither agreed nor disagreed with the trial examiner's conclusion that the unions had violated § 8(b)(2) by striking for the inclusion of the jurisdiction clause in future collective bargaining agreements. It said in a footnote to its decision that while it agreed with the trial examiner that the unions had violated § 8(b)(2) by striking to force the employers to accede to the unions' demands for the illegal foreman and general laws clauses, it found it "unnecessary to pass upon his finding that the Respondents violated Section 8(b)(2) by so striking also for the jurisdiction clause." Our consideration of this clause is, therefore narrowed to the question whether by insisting upon its inclusion in the future contracts the unions refused to bargain collectively in violation of § 8(b)(3).

There is no dispute that in both cases the jurisdiction clauses on which the unions insisted covered not only work which the unions and the employers had regarded in the past as composing room work, but also a number of job processes and operations which the employers had not and did not contemplate installing in their plants.[8] In the case of Worcester it also covered, as previously noted, paste-makeup work which for years had been done by artists who did not work in the composing room and who had never been included in the composing room bargaining unit.[9]

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[8] Worcester offered to include a clause in the new contract to the effect that it would not introduce certain new processes during the life of the contract but the unions rejected the offer.

[9] In the § 10(k) proceeding referred to earlier in this opinion the Board held that Local 165 and its agents were not lawfully entitled to force or require Worcester to assign paste-makeup work to a member of the union rather than to an employee of its own choice.

Both employers had for years recognized their composing room employees as forming appropriate units for collective bargaining purposes, but there had never been a Board determination to that effect. Nevertheless, the trial examiner, the Board concurring, had no difficulty in finding that the composing room employees of the employers in the classifications covered by the past agreements between the unions and the employers, subject to the statutory exclusion of foremen, constituted appropriate units for the purpose of collective bargaining within the meaning of § 9(a) of the Act. And it was similarly found that the respective unions represented a majority of the employees in those units. But, noting that in general the Board in the past had refused to include nonexistent or future job operations in the units it considered appropriate for the purposes of collective bargaining, it was determined by the trial examiner, the Board affirming, that units including nonexistent or future job operations upon which the unions insisted in their negotiations for future contracts were inappropriate. Hence it was determined that by insisting upon bargaining only for inappropriate units the unions had not fulfilled their obligation to bargain as required by § 8(b)(3) of the Act.

The Board's power to determine the units appropriate for collective bargaining is broad. "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Co.* v. *Labor Board*, 330 U.S. 485, 491 (1947).

The unit on which the unions insisted is not a positively illegal unit, as for instance one including supervisory employees. Moreover, we cannot doubt that in a proper proceeding the Board in the exercise of its broad power could either include or exclude future or non-existent job

operations from the unit it determined appropriate for collective bargaining purposes. Thus this is not a case in which the unions are pressing for an obviously inappropriate unit. It may very well be sound policy for the Board not to include non-existent or future job classifications in the units it determines appropriate for collective bargaining purposes. It may be wiser to wait for the benefit of experience with new processes and operations rather than to attempt to anticipate the skills that may be required to carry them out. Moreover, inclusion of future or non-existent job operations in a bargaining unit sets the stage for future proceedings under § 10(k) of the Act to settle jurisdictional disputes. Although the Board may think the unit on which the unions insisted inappropriate, it was not illegal, for a unit including future or non-existent jobs is neither unlawful *per se* nor obviously and clearly inappropriate.

The question is whether by insisting on the broader unit the unions in effect were refusing to bargain collectively with the employers. To paraphrase what this court said in *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1, 1953), the question is whether it is to be inferred from the totality of the unions' conduct that they went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that they bargained in good faith but were unable to arrive at an acceptable agreement with the employers. This question, however, the Board itself answered when it adopted the trial examiner's finding that the unions were desirous of securing contracts with the employers. It may be that the unions were uncompromising in their jurisdictional demands, but under § 8(d) of the Act quoted in footnote 12, *infra*, the obligation to bargain collectively "in good faith" does not compel either party to agree to a proposal or require the making of a concession. See *Labor Board* v. *American Insurance Company*, 343 U.S. 395 (1952). Although the unions may have insisted rather

stubbornly in their demand for the jurisdiction clause, we have little difficulty, in view of the finding that they sincerely desired contracts, in concluding that the unions by their insistence on the clause did not refuse to bargain collectively as required by § 8(b)(3) of the Act.

The Foreman Clause

This clause as proposed and insisted upon by the unions provides: "The hiring, operation, authority and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the Union. In the absence of the foreman, the foreman-in-charge shall so function.

"All orders, instructions, reprimands, etc., must be given through the foreman who shall have the right to assign men to any composing room work he deems necessary." [10]

The trial examiner and the Board found that by insisting upon this clause the unions refused to bargain in good faith and that by striking in support of their insistence upon the clause the unions had undertaken to restrain or coerce the employers in the selection of their representatives for the adjustment of grievances in violation of § 8(b)(1)(B) of the Act.[11] The reasoning by which the trial examiner and the Board reached this conclusion is fragmentary and far from clear. Indeed, the trial examiner's intermediate re-

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[10] In the Worcester case the clause contained the further provision:

> "The Union shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement."

[11] "It shall be an unfair labor practice for a labor organization or its agents—

> "(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . . ."

port, which the Board affirmed, consists of a lengthy recapitulation of the evidence interspersed here and there with a finding of fact followed by lengthy conclusions summarized in brief paragraphs. This technique of decision has not only rendered our consideration of this case exceedingly difficult and needlessly time consuming but has also served better to conceal than to disclose the Board's reasoning. Nevertheless, we agree with the Board's conclusions with respect to the foreman clause.

There can be no doubt that the foreman's duties necessarily included participation in the adjustment of employee grievances. Hence, by insisting that the foremen must be union members, the unions were restraining and coercing the employers in the selection of their representatives for grievance adjustment purposes. Not only would the clause as proposed by the unions limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union.

It seems to us equally clear, however, that by insisting on the foreman clause as they wanted it, the unions violated §8(b)(2) of the Act quoted in material part in footnote 7, supra, for the effect of the clause would be to cause the employers to discriminate in favor of union men in appointing their foremen thereby encouraging aspirants for that position to join the union. And § 8(b)(2) covers all situations in which the union seeks to cause the employer to accept conditions under which any non-union employee or job applicant will be lawfully discriminated against. *NLRB* v. *National Maritime Union*, 175 F.2d 686, 689 (C.A. 2, 1949). Thus we believe that by striking for the foreman clause the unions violated § 8(b)(2) of the Act as well as § 8(b)(1)(B).

And we think that in holding out for the clause the unions also refused to bargain collectively in violation of § 8(B)(3). There may be cases in which uncompromising insist-

ence upon a legal contract clause is so utterly unreasonable under the circumstances as to warrant an inference of bad faith. The problem is to reconcile the duty to "confer" in "good faith" imposed by § 8(d) of the Act [12] that is to say with the sincere and honest desire to reach an agreement if possible, and the right conferred in that section, perhaps, even stubbornly, to refuse to agree to a proposal or to make a concession with respect to contract clause. However, to hold that good faith is a defense to the charge of refusal to bargain when the contract provision insisted upon is illegal *per se* is to put a premium on ignorance of the law or blind intransigency. Thus, as to this clause, the unions are not saved by the finding that they negotiated with the genuine desire to arrive at a contract.

It is true that in the Haverhill case the foreman clause was not a key issue. And it is also true that after the strikes the unions withdrew their demands for the clause. But there is no assurance that their demands for inclusion of the clause will not be renewed. Since bargaining demands for, and a strike aimed at forcing an employer to accede to, the inclusion of an obviously illegal provision in a collective bargaining contract justify enforcement of a cease and desist order, see *NLRB* v. *National Maritime Union*, 175 F.2d 686, 689 (C.A. 2, 1949), we think the Board is entitled to enforcement of its order so far as this clause is concerned.

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[12] "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonabl times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; . . . ."

The General Laws Clause.

There can be no doubt, indeed it is not seriously disputed, that several of the provisions of ITU general laws, if literally applied, would import illegal union security provisions into any collective bargaining agreement into which they might be incorporated. The question is whether the "not in conflict with law" provision, and the provision that the contract alone shall govern relations between the parties as to all matters concerning which it makes any provision, of the proposed contract clause with respect to the inclusion of the ITU general laws serves to immunize the proposed contract from the illegality of many of the general laws of ITU.

The provision that contract terms alone shall govern with respect to all matters as to which it makes any provision does not call for extended consideration, for it is clear that the local unions would not, and indeed could not, under ITU rules and regulations, enter into any collective bargaining agreement without ITU approval, and ITU's insistence that "Union language must be taken" with respect to its general laws demonstrates that ITU would not approve any contract provision substantially in conflict with its laws. The "not in conflict with law" provision or savings clause, as it is sometimes referred to, requires more lengthy discussion.[13]

The United States Court of Appeals for the Second Circuit has answered in the negative the question of the immunizing effect of a not in conflict with law provision comparable to the one in the case at bar. In *Red Star Express Lines* v. *NLRB*, 196 F.2d 78, 81 (C.A. 2, 1952), that court per Judge A. N. Hand, Judge L. Hand dissenting, took the view that the question was not merely whether under prin-

[13] The unions insist that in this case the clause should be called an "exclusionary clause." We see no significant difference in the terminology to be employed. We are not deciding this case on an issue of semantics.

ciples of contract law a "savings clause" addendum to a contract containing an illegal union security clause would contractually negative that clause. It took the view that the question was more whether the savings clause would have the effect of preventing the coercion which would otherwise follow from inclusion of the illegal clause in the contract.[14] As to the effect of the savings clause, the court accorded weight to the view of the Board. It noted that entering into a contract containing an illegal union security clause would constitute an unfair labor practice because the existence of such an agreement without more (whether enforced or not), would tend to encourage union membership. The court then said that the Act required that employees should be free to choose between joining and refusing to join a union and forbad any form of interference with that choice, and from this concluded that a contract containing an illegal union security clause, even though modified by an addendum in the form of a provision excluding whatever contract clause might be illegal, would not eliminate the coercive effect of the contract. "For," the court said, "the question is not only whether under principles of contract law the addendum would contractually negative the illegal union security clauses, but whether it would have the effect of preventing the coercion that would otherwise follow" from the inclusion of such clauses in the body of the contract. The court then said: "The Board found it would not have such an effect 'because it fails to specify which, *if any*, clauses were to be suspended.' In our opinion the Board was entitled to adopt this view as a matter of sound policy and reasonable interpretation. The vague language of the addendum would not help the ordinary employee to understand that the union security clause was no longer binding."

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[14] We perceive no reason why the coercive effect of the illegal clauses would be lessened if, as in this case, they are incorporated by reference into the contract, rather than written into the contract itself.

As explained in *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719, 723, 724 (C.A. 2, 1952), the court's reasoning in the *Red Star Express Lines* case was "that an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of a clause." In accord see *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 780 (C.A. 2, 1954).

The question is not free from doubt. Nevertheless, in spite of perhaps some inferences to the contrary to be drawn from *Honolulu Star-Bulletin, Ltd.* v. *NLRB*, 274 F.2d 567 (C.A. D.C. 1959), we agree with both the reasoning and the result of the cases from the Court of Appeals for the Second Circuit cited above.

The question now arises whether a union is to be found guilty of unfair labor practices when it bargains for and strikes to coerce an employer to consent to the inclusion in a collective bargaining agreement of clauses of honestly disputable validity at the time of the union action. We think this question must be answered in the affirmative.

It is true that the legality or illegality of the unions' conduct at the bargaining conferences and in calling the strikes, so far as the General Laws clause is concerned, can only be determined by subsequent action by the Board followed by proceedings in a court of appeals or perhaps in the Supreme Court of the United States. But, as this court pointed out in a comparable situation in *NLRB* v. *Local 404, etc.*, 205 F.2d 99, 102, 103 (C.A. 1, 1953), "this in itself presents no unique situation." The point in that case as in this is simply that the unions were acting at their peril, that is to say, at the risk of an enforcement order, when they sought to compel the employers to submit to their demand for inclusion of the ITU general laws in the collective bargaining contracts under negotiation.

ITU's contention that it is not a proper party to this proceeding, and so that the Board erred in finding that it had committed any unfair labor practices, deserves only brief consideration. There can be no doubt whatever that officers of ITU actively participated with officers of the local unions in negotiating for contracts with both Haverhill and Worcester. Nor can there be any doubt that under ITU rules and regulations any contracts negotiated by the local unions had to be submitted to and approved by an agency of ITU. Furthermore, the evidence is clear that in both cases the strikes were sanctioned and approved by high officers of ITU. We think it clear that under these circumstances ITU, and in the Worcester case its Executive Council, were proper parties to this proceeding and were properly chargeable with the unfair labor practices found to have been committed by the locals. See *American Newspaper Publishers Ass'n* v. *NLRB*, 193 F.2d 782, 804, 805 (C.A. 7, 1951, *cert. denied* on this point 344 U.S. 812 (1951).

The order entered by the Board, in effect, requires both respondents to cease and desist from engaging in action with respect to Haverhill and Worcester that would violate sections 8(b)(1)(B), 8 (b)(2), and 8(b)(3) of the Act *in any manner*. See *Communications Workers etc. et al.* v. *N.L.R.B.*, decided by the Supreme Court of the United States May 2, 1960. We consider this order to be excessively broad. It is true that this court upheld an order forbidding a union to engage in certain conduct with respect to any other employer. *NLRB* v. *Springfield Building & Const. Trades Council*, 262 F.2d 494 (C.A. 1, 1958). In that case, however, the unions were told what the proscribed conduct was. As the Board's order now stands any alleged violation of the aforementionad sections would be tried in this court in the first instance in a contempt proceeding, no matter how unrelated it may be to the earlier illegal activity engaged in by the union. And, "the authority conferred on the Board to restrain the practice which it has found

the employer (union) to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." *Labor Board v. Express Publishing Co.*, 312 U.S. 426, 433 (1941). Accordingly, we restrict the Board's order to the specific practices found to be unlawful, or practices persuasively related thereto.

A decree will be entered enforcing the Order of the Board as modified in accordance with this opinion.

United States Court of Appeals For the District of Columbia Circuit

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No. 15044

HONOLULU STAR-BULLETIN, LTD., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
HONOLULU TYPOGRAPHICAL UNION #37, *Intervenor*

On Petition to Review and Set Aside and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

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Decided November 25, 1959

Before PRETTYMAN, Chief Judge, and EDGERTON and WILBUR K. MILLER, Circuit Judges.

PRETTYMAN, *Chief Judge:* This is a petition to review an order of the National Labor Relations Board; there is also a cross-petition for enforcement of the order. Our petitioner, Honolulu Star-Bulletin, Ltd., publishes a daily newspaper in Hawaii and also has a commercial printing business. After collective bargaining it entered into a contract with the Honolulu Typographical Union No. 37, an affiliate of the International Typographical Union AFL-CIO. The employees involved were those in the composing room.

The company discharged two employees, named Tamanaha and Van Kralingen. They brought charges against the company, and the General Counsel to the Board issued

a complaint charging unfair labor practices. The complaint alleged that the company discharged and refused to reinstate Van Kralingen because of his activities on behalf of the Union and because of other concerted activities for the purpose of collective bargaining. It alleged that the company discharged Tamanaha at the demand of the Union because his Union membership was revoked by the Union for his failure to complete a course of study provided by the Union. The Union intervened in the proceeding in support of the company.

The Board held that the contract between the company and the Union was illegal *per se* and that the two employees were discharged in violation of the statute. It ordered the reinstatement of the two men with back pay. It further ordered the company to reimburse all its employees and former employees in the composing room for all dues and assessments paid to the Union during the period covered by the charges, fixed as beginning six months prior to the service of the initial charges.

The Board held that the contract required the employment of Union members only, unlawfully delegated to the Union complete unilateral control over the hiring process, and made the payment of dues and assessments a condition of employment. In summary, as the Board tells us in its brief here, its holding was that the contract incorporated closed-shop provisions which appear in the General Laws of the International Typographical Union. The Board's reasoning was that the shop foreman was a member of the Union, that he had the power to hire and fire, and that he, as a member of the Union, was bound by the General Laws of the Union.

The foregoing ruling of the Board is conclusively refuted by the terms of the contract. The pertinent provisions are:

> "Section 2. *Employees.* (a) The words 'employee' or 'employees' when used in this agreement apply to

journeymen and apprentices. The term 'journeymen' and 'apprentices' *shall in no way be understood to apply exclusively to members of the* International Typographical *Union.*

* * * *

"Section 24. * * *

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"(c) * * * It is understood and agreed that the general laws of the International Typographical Union, in effect January 1, 1956, *not in conflict with federal* and territorial (state) *law or this contract*, shall govern relations between the parties on conditions not specifically enumerated herein. * * *." (Emphasis added.)

The provisions of Section 2(a), above quoted, seem to us to be clear beyond question. The specific provision was that employees, who must be journeymen or apprentice printers, need not be members of the Union. Section 24(c), as shown by the above quotation, clearly provided that the General Laws of the Union in conflict with either federal law or the contract itself were not included in the contract. A closed-shop provision would have been in conflict with the federal law[1] and also in conflict with Section 2(a) of the contract. Any such provision in the General Laws was excepted from inclusion in this contract. We do not see how language could have been clearer.[2]

If the terms of the contract were ambiguous, which we think they are not, we would look to the conduct of the

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[1] Labor Management Relations Act § 8(a)(3), 61 STAT. 140 (1947), as amended, 29 U. S. C. § 158(a)(3) (1958).

[2] We find no merit in the Board's contention that Section 24(c) of this contract, is merely a savings clause of the type found ineffectual in *Red Star Exp. Lines* v. *N. L. R. B.*, 196 F. 2d 78 (2d Cir. 1952), and other cases cited to us. In *Red Star* the savings clause was held insufficient to remove the coercive effect upon employees of an explicit (illegal) union-security clause. The present contract contained no such explicit provision, and Section 24(c) was not a suspension of the operation of any illegal clause but rather an incorporation of certain general laws.

parties under the contract to ascertain its meaning. The fact is that, for some years prior to, as well as during, the events here involved, five of the thirty-five employees in the composing room were non-Union men. During the year preceding the hearing the foreman, who had power to hire, had employed four non-Union men. These facts support the provisions of the contract as we read them.

As a matter of fact Article XIV of the General Laws of the Union provides specifically that "In circumstances in which the enforcement or observance of provisions of the General Laws would be contrary to public law, they are suspended so long as such public law remains in effect."

If the matter were open to inference, it seems to us powerful circumstances would be necessary to justify an inference that a Union of so widespread membership and affiliated locals as is this one (the ITU) would deliberately insert in every contract negotiated by it a clause flatly in violation of a federal statute, thus making every such contract illegal. The President of the ITU was careful on this point. Approving this contract he wrote that it was "in compliance with the laws of the International Typographical Union as limited by the Taft-Hartley law."

The Board presents two contentions in support of its view. The first is that since the foreman was a Union man it must be assumed that he would be guided in his hiring by the Rules of the Union rather than by the contract between his employer and the Union. In the first place, as we have already indicated, such an assumption would be contrary to the fact; he did hire non-Union men. In the second place, a similar argument was made to this court in *Carpenters District Council* v. *N.L.R.B.* and was rejected.[3] The Board's second contention is that the rank and file of employees and potential employees

[3] .... U. S. App. D. C. .. .., ... F. 2d .... (1959).

would have the impression that the Rules of the Union, rather than the contract between the employer and the Union, would govern the employment policies of the employer. In other words, the Board says that, since the contract mentions the Rules of the Union, employees would have the impression that the Rules were incorporated in their entirety, and would not differentiate those contrary to law or to the contract. From that premise the Board reasons that the contract is *per se* a closed-shop contract. This conclusion is a complete *non sequitur*. An erroneous impression of plain terms does not change the meaning of the plain terms. Furthermore assumptions that employees will not understand a lawful contract cannot be a basis for holding the contract illegal. What would be the justification for emphatic insistence upon formal collective bargaining as to terms of employment, if the conduct of the parties thereafter is to be judged by speculative, uninformed impressions of those terms instead of by the terms themselves as hammered out at the negotiation table?

The Board says the phrase "not in conflict with federal • • • law" in Section 24(c) of the contract places an onerous burden on employees seeking to determine what the contract in fact provides. As to some conditions in the General Laws of the Union there might be uncertainty; we do not know as to that. But there could hardly be any uncertainty respecting a closed-shop clause so far as this contract is concerned. Furthermore, as counsel for the intervening Union cogently points out, the Board's language in its own order demonstrates the inevitability of some uncertainty and confusion in this general area. The Board twice, in the "Notice to All Employees" which it required to be posted, directs the company to recite an abjuration of certain activities "except to the extent permitted by Section 8(a)(3) of the Act". Counsel pointedly queries whether the latter quoted expression is less confusing than the phrase "not in con-

flict with federal * * * law". In this connection we are impelled to inquire: What could be more confusing to rank-and-file employees than an official ruling that a contract which specifically says they need not be members of a union means that they must be members?

We hold erroneous the conclusion of the Board that this contract was illegal *per se*.

This brings us to the discharges of the two employees. First as to Van Kralingen: The night foreman, one Blade, under whom Van Kralingen worked, testified in detail and at length that Van Kralingen, on an average of two or three times a night,—"It got to the place where it was rather incessant and continuous"—engaged groups of employees in discussions. He testified that as a result Van Kralingen's production as an individual was down and the "Furthermore, he was disturbing the morale and production of the entire shop." He therefore repeatedly recommended to the foreman of the shop, one Larson, that Van Kralingen be discharged. Blade testified that because of a shortage of labor they decided "to more or less try to neglect it," hoping that the trouble would clear itself up and get better. However, he testified, the difficulty increased—"That was what brought about his discharge."

Van Kralingen had been hired on July 2, 1956. When Larson, the foreman, came to work on November 12, 1956, he found posted on the bulletin board a long letter signed by Van Kralingen and addressed to "Union Brothers and Sisters". It appears that Van Kralingen was running for chairman of "the chapel", and this was his platform. One item strongly stressed was that the company hired non-Union men. His plan was that the Union invite the non-Union men to join but that, if they were not thus convinced, the Union men should show the non-Union workers "that we do not care to associate with them, either, even to the extent of talking to them." The letter

emphasized that the non-Union men were taking home more money than the Union members, because the latter had to pay Union dues. Foreman Larson testified that this letter was "just the clincher, that's all." He said that the letter was in direct violation of the contract between the company and the Union, that it urged a boycott of the non-Union men in the shop, and that he realized that there was just no hope of straightening the man out. Thus there was explicit testimony by the foreman and the night foreman as to the reason for the discharge, and there was undisputed factual foundation for the reason thus given.

The Board says that, since Larson did not have before him at the moment he discharged Van Kralingen, a request from the night foreman that he be discharged, he did not discharge Van Kralingen because of complaints by the night foreman. That position is untenable. In the first place, without any contradictory evidence it ignores the unequivocal testimony of Larson, the foreman. In the second place, the complaints of the night foreman, repeated over a considerable period of time, the last one only a few days, possibly a week, before the date of the discharge, would clearly have a cumulative effect on Larson. He so testified. With such a series of complaints and requests for discharge before him, almost any additional incident might be the "clincher". It seems to us wholly untenable to ignore the series of events and, without explicit evidence to support the inference, to infer that only the final event was the cause of discharge.

We are of opinion that the finding of the Board that Van Kralingen was discharged because of protected Union activities is not supported by substantial evidence on the record as a whole.

We are of opinion that the conclusion of the Board that Tamanaha was discharged because he was no longer a member in good standing of the Union, and pursuant to

the Union's demand, is supported by substantial evidence. There was evidence which would have supported a contrary result. The contract required the company to employ a specified number of apprentices and a proportionate number of journeymen in the composing room. The full number of apprentices were already on the roll, so Tamanaha was given a temporary status as a journeyman, his retention in that status being conditioned upon his taking a course of study and qualifying himself as a journeyman. So the prerequisite to his keeping the job was not membership in the Union but was full qualification as a journeyman. But, on the other hand, there was a cancellation of his Union membership and a demand on the company by the Union for his discharge. These facts supported the Board's view of the matter, and they are sufficient.

The Board ruled that the company must reimburse all its employees and former employees in the composing room who had paid dues and assessments to the Union. This was on the theory that the contract was unlawful, in that it encouraged employees to join the Union to obtain work, thereby inevitably coercing employees to pay dues and assessments to the Union. Since we find that the contract was not illegal and was not a closed-shop agreement, the premise for the Board's ruling falls. The Board's finding that the payment of dues and assessments to the Union was made a condition of employment is without the slightest semblance of support in the record. This provision of the order, therefore, will not be enforced.

The case must be remanded to the Board for entry of orders not inconsistent with this opinion. The cross-petition now before us for enforcement of the order will be denied. Technically one paragraph of that order (dealing with Tamanaha) could be enforced, but it seems to us a less confusing procedure is to cancel that order and enter another limited to the permissible provisions.

Order set aside, and case remanded.

United States Court of Appeals
For the Second Circuit

No. 45—October Term, 1959.

(Argued January 12, 1960 Decided May 20, 1960.)

Docket No. 25496

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

NEWS SYNDICATE COMPANY, INC., and NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, *Respondents*.

Before: CLARK, HINCKS and WATERMAN, *Circuit Judges*.

On petition of National Labor Relations Board for enforcement, its order, 122 NLRB No. 92, is set aside and the case remanded.

HINCKS, *Circuit Judge*:

The National Labor Relations Board petitions for enforcement of its order[1] which issued as a result of charges filed by a mail room employee of each of two New York newspapers, the New York Daily News, published by News Syndicate Company, Inc., herein called the News, and the Wall Street Journal, published by Dow Jones and Company, Inc., herein called the Journal. The charges were

[1] The Board's decision and order (which were issued on January 2, 1959; corrected on January 21, 1959; and amended on March 2, 1959) are reported at 122 NLRB 818.

brought[2] only against the News and against the New York Mailers Union No. 6, International Typographical Union, AFL-CIO, herein called the Union, with whom, both in 1954 and 1956, the News and the Journal had executed two-year collective bargaining agreements covering their mail room employees.[3] The Board held that these contracts,[4] when read in conjunction with their references to the General Laws of the International Typographical Union, herein called the General Laws, constituted *per se* violations of Section 8(b)(1)(A) and (2), and Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U. S. C. A. § 151 *et seq.*, by the Union and the News, respectively.

The Board also found that the respondents had, in fact, maintained and enforced unlawful Union security and preferential hiring practices at the News and Journal mail rooms, as a result of which the two complaining employees, Burton Randall, at the News, and Julius Arrigale, at the Journal, were unlawfully discriminated against in their employment. Numerous remedies were ordered, which, however, in view of our conclusions on other dispositive issues, we need not discuss.

We will first deal with those contractual provisions held to be *per se* violative of the Act. The contract contains nothing which on its face could be said to be violative of the Act. The General Counsel so conceded at the hearing and the Board does not contend otherwise. Rather, it here advances the same argument which was recently rejected by the District of Columbia Circuit. *Honolulu Star*

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[2] Since no charges were filed against the Journal, the Board made no unfair labor practice findings with respect to it.

[3] All New York City newspaper publishers subscribed to the 1954 and 1956 contracts, herein attacked as unlawful, and which are more fully described below.

[4] The two contracts involved herein are identical in their pertinent provisions and they shall, hereafter, be referred to in the singular.

Bulletin v. N. L. R. B., 274 F. 2d 567. Because of our substantial agreement with the penetrating and sound conclusion of that court, we shall have less to say on this aspect of the instant controversy than if the argument had not already had such authoritative judicial consideration.

The Board's position now is that, notwithstanding the seemingly legal contractual provisions which limit mail room employment to "journeymen and apprentices," who are defined quite innocuously in Section 20-b of the contract and without reference to Union membership,[3] see *Evans v. International Typographical Union*, D. C. Ind., 81 F. Supp. 675, 686; the contract is illegal because of a clause therein which incorporates those General Laws of the International Union which are "not in conflict with this con-

[3] Excerpt from Section 20-b:

"* * * Only journeymen and apprentices shall be employed on work covered by this agreement. Apprentices may be employed only in accordance with the ratio of apprentices to journeymen provided elsewhere in this agreement. Journeymen are defined as: (1) Persons who prior to the effective date hereof worked as such in the mailing rooms of papers signatory to this contract; (2) persons who have completed apprentice training as provided in this contract, or have passed a qualifying examination under procedures heretofore recognized by the Union and the Publishers; (3) persons who have passed an examination recognized by both parties to this contract and have qualified as journeymen in accordance therewith. Persons seeking to qualify as journeymen shall be given an examination under nondiscriminatory standards and procedures established by the parties hereto by impartial examiners qualified to judge journeyman competency selected by the parties hereto. In the event agreement cannot be reached on the standards or procedures to be followed, or the examiners to conduct such examinations, the dispute shall be submitted to the Joint Standing Committee whose decision shall be final and binding on the parties."

The General Counsel commented at trial that "My reading of the contract did not indicate that there was any violation with respect to the method by which a person could become a journeyman, at least from the face of the contract. That appeared to be valid as set out in Section 20(b) of the contract."

tract or with federal or state law" to "govern relations between the parties o conditions not specifically enumerated herein."[6]

Certain of these General Laws concededly condition journeymen and apprentice status on Union membership and they further require each local Union to establish Union employment priority and seniority systems covering its members.[7] Such conditions, the Board held, unlaw-

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[6] Section 24 of the contract reads:

"Both parties agree that their respective rights and obligations under this contract will have been accorded by the performance and fulfillment of the terms and conditions thereof and that the complete obligation of each to the other is expressed herein. It is understood and agreed that the General Laws of the International Typographical Union in effect January 1, 1955, not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein."

Section 38 provides:

"*Mutual Gyarantees.* Because of the enactment of the Labor-Management Relations Act of 1947 this contract differs from contracts between these parties over a period of many years. It is understood and agreed, however, for the duration of this contract, that if any provision modified from any preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof."

The respondents assert without challenge that no union security clause has appeared in a collective bargaining agreement between the parties since 1948.

[7] Extracts from General Laws:

"ARTICLE V—FOREMEN

"Section 11. All persons performing the work of foremen or journeymen, at any branch of the printing trade, in offices under the jurisdiction of the International Typographical

fully created discriminatory and coercive conditions. It also held illegal the contractual provisions vesting hiring authority in the mail room foremen, who were required to

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Union, must be active members of the local union of their craft and entitled to all the privileges and benefits of membership.

"ARTICLE VII—MACHINES

"Section 1: • • • None but members [of the ITU] shall be permitted to operate, maintain and service any mailing machinery or equipment when used on work under the jurisdiction of the International Typographical Union. • • •

"Section 2: In machine offices under the jurisdiction of the International Typographical Union, no person shall be eligible as a 'learner' on machines who is not a member of the International Typographical Union. • • •

"ARTICLE X—PRIORITY

"Section 2: Subordinate unions shall establish a system for registering and recording priority standing of members in all chapels, which shall be conspicuously posted or kept in a place within the chapel accessible to members at all times. The priority standing of a member shall stand as recorded.

"Section 5: Any member engaged to serve the International Typographical Union, a subordinate union or to perform work in the interest of the organized labor movement, or any member incapacitated by illness, shall not be deprived of priority standing while so employed or so incapacitated. Such member shall employ while absent the priority substitute competent to perform the work if one is available. The situation holder shall not suffer loss of situation or priority in the event such a substitute is not available. After thirty calendar days the situation shall be filled by priority sub, and considered in the category of a new situation. Upon reporting for duty full priority rights shall be restored.

"Section 6: Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder from his or her situation for more than thirty calendar days, and whose priority is protected under the provisions of other sections of I.T.U. laws or contracts: Provided, Should a substitute with greater priority become available such substitute shall be placed on said situation: Provided, further, Local unions may establish by contract, for the purpose of avoiding multiple changes in preferred shifts and starting times, for the employment of the available priority substitute after thirty calendar days and continuing to, but not more than ninety days from absence of situation holder."

be Union members in good standing, since, reasoned the Board, such foremen would have to follow, both under the terms of the contract and under their Union oath,[8] the closed-shop and priority and seniority system provisions of the General Laws. Finally, on the basis of the foremen's hiring authority under the contract and their Union obligations, the Board concluded that, regardless of the unlawful provisions of the General Laws, the News had unlawfully delegated exclusive mail room hiring to the Union, in a fashion incompatible with the expressed standards required by the Board. *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 833, 893, 897, enforcement denied, *N. L. R. B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con.*, 9 Cir., 270 F. 2d 425.

The respondents[9] raise several serious objections to the Board's conclusion that the contract was illegal on its face. But we find it necessary to go no further than to overrule the Board's holding on the reasoning and on the ground developed in *Honolulu Star Bulletin* v. *N. L. R. B.*, *supra*. See also *Lewis* v. *Quality Coal Corp.*, 7 Cir., 270 F. 2d 140. The facts of the case here fall directly within the scope of the *Honolulu Star* case: the contract here contained no explicit illegal Union security clause and did not purport to incorporate illegal provisions of the General Laws, but only those which were "not in conflict * * * with federal or

[8] The Board points to various provisions in the General Laws and local Union constitution, by-laws and rules which require all Union members to comply with all Genera' Laws and local Union laws. These laws in turn provide for closed-shop and preferential hiring conditions. The Union points to both a 1951 amendment of the General Laws which abolished an oath provision requiring discrimination against nonmembers and a 1953 amendment to the ITU's Constitution which abolished a prior provision requiring all members to accord preference to other members.

[9] In addition to the respondents, the International Typographical Union, AFL-CIO, has filed a brief in opposition to the Board's petition, pursuant to this Court's permission.

state law . . . ."[10] In this respect the contract is distinguishable from those involved in *Red Star Express Lines* v. *N. L. R. B.*, 2 Cir., 196 Fed. 2d 78, and other cases relied on by the Board, such as *N. L. R. B.* v. *Gottfried Baking Co.*, 2 Cir., 210 F. 2d 772, and *N. L. R. B.* v. *Gaynor News Co.*, 2 Cir., 197 F. 2d 719, affirmed 347 U. S. 17. In such cases, hypothetical language in collective bargaining agreements as to the effect of illegal union security provisions which were explicitly included therein was thought to be insufficient to negate their illegal coercive force. The cases make it plain that in scanning a contract for its possible coercive effect on employees the test is whether the natural and foreseeable consequence of the language adopted is to encourage union membership. Cf. *Radio Officers* v. *N. L. R. B.*, 347 U. S. 17, 52. We hold this is not such a contract.

The Board also held that the contract, by its reference to the General Laws, delegated complete control over seniority matters to the Union, and hence tended to encourage Union membership in violation of the Act. In so ruling, the Board relied upon *Matter of Pacific Intermountain Express Co.*, 107 NLRB 837, enforced as modified, *N. L. R. B.* v. *International Brotherhood of Teamsters*, 8 Cir., 225 F. 2d 343; see also *N. L. R. B.* v. *Dallas General Drivers, Etc.*, 5 Cir., 228 F. 2d 702.

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[10] While in the contract before us the term "journeyman and apprentice" is not explicitly defined to exclude nonunion employees, the contract did not, as in the *Honolulu* case, specifically provide that the term "journeyman and apprentice," was in no way to be interpreted as applying exclusively to Union members. However, we do not read the *Honolulu* opinion as turning primarily upon that provision. Its real thrust was its rejection of the same incorporation by reference argument here urged. Indeed, in an earlier case before the Board, a trial examiner found similar contractual provisions valid and he rejected the "incorporation by reference theory" here advanced. The Board, at that time, did not object to his ruling. *Matter of Kansas City Star Co.*, 119 NLRB 972.

As to this we think there is a fatal defect in the Board's minor premise, viz., that unrestricted hiring and seniority control was, under the contract, delegated to the Union. Initially, we note that the contract itself does not purport to make such a delegation: on the contrary, it deals specifically with many crucial problems of employee priority and seniority. Thus, under Section 20-a of the contract, the foreman is given hiring authority, but the order of hiring priority and seniority is clearly spelled out with respect to decreasing and increasing the work force.[11] Furthermore, under Section 22 the seniority status of employees who are on leave of absence for military and Union reasons is also

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[11] Section 20-a of the contract reads:

"The operation, authority, and control of each mail room shall be vested exclusively in the office through its representative, the Foreman. In the absence of the Foreman, the Foreman-in-Charge shall so function. Formen of Mail Rooms have the right to employ help and may discharge (1) for incompeteney, (2) for neglect of duty, (3) for violation of office rules, which shall be kept conspicuously posted, and which shall in no way abridge the civil rights of employees or their rights under accepted International Typographical Union laws, and (4) to decrease the force, such decrease to be accomplished by discharging first the person or persons last employed, either as regular employees or as extra employees, as the exigencies of the matter may require. Should there be an increase in the force, the persons displaced through such cause shall be reemployed in reverse order in which they were discharged before other help may be employed. Upon demand, the Foreman shall give the reason for discharge in writing. The substitute oldest in continuous service shall have prior right in the filing of the first vacancy."

Section 20-b reads:

"The Foreman shall do all the hiring and discharging of all employees engaged in working in the various mail rooms. The Foreman shall have sole authority to issue orders, but he may designate other members to act as Assistant Foremen to direct the work, and all employees shall comply with all such orders issued within the terms of this agreement. Failure to comply shall constitute grounds for discharge."

expressed in the contract.[12] We are, therefore, hard pressed to discover language indicative of a contractual intent to delegate authority to the Union to determine the seniority of even its own members, since it would appear that any General Laws dealing with seniority matters would be "in conflict with this contract," and would not concern "relations between the parties on conditions not specifically enumerated herein."[13] Moreover, under Section 33 seniority controversies, at least those arising out of the contractual provisions, were subject to the contractual arbitration machinery and were not under exclusive Union control.[14]

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[12] "Section 22-a. *Union Activity.* When any members of New York Mailers' Union No. 6 are on leave of absence from their jobs because of holding office in New York Mailers' Union No. 6, or the International Typographical Union, or performing any service for these Unions, such members shall be returned to their former or similar positions on the expiration of their leave. The Union shall certify to such absence to the Foreman in writing.

"Section 22-b. In cases where employees are admitted as residents of the Union Printers' Home, or who enlist in or are drafted for service in the military or naval services of the United States or the Dominion of Canada (or their allies) in time of war or for the duration of any period of national emergency proclaimed by the governments of said countries or during the time when such armed forces are engaged in active combat with the military forces of another nation which presents a threat to the security of the United States or Canada, or those who may actively engage in war work for the American Red Cross, or other similar accredited agencies, their situations and/or priority standing shall be protected and upon again reporting for duty the situations and/or priority standing formerly held by these employees shall be restored to them."

[13] See fn. 6, *supra.*

[14] Section 33-b provides:

"To the Joint Standing Committee shall be referred for settlement all questions which may arise as to the scale of wages, all disputes (except discharge cases) arising out of the operation of this agreement, all disputes regarding the interpretation of any portion of this agreement and any and all disputes (except discharge cases) arising out of, relating to, or affecting the operation of this contract. The Joint Standing Committee must meet within five (5) days from the date on which either party hereto, through its authorized representa-

Even if we were to assume that the contract incorporates those General Laws which provide that local Unions shall maintain priority and seniority lists of their members,[15] we could not accept the Board's conclusion that the parties had thereby delegated exclusive control over seniority matters to the Union. The contract expressly provides that "all disputes arising out of, relating to, or affecting the operation of this contract" are subject to arbitration, and surely seniority disputes would be included therein. The Board's contrary view, which is based upon the fact that the General Laws were not subject to arbitration, is not persuasive, since it would be the local seniority lists rather than the General Laws which would be arbitrated. Finally, the uncontradicted testimony of the Union's president that all controversies dealing with priority and seniority were subject to, and had, in fact, gone to arbitration, indicates that the parties interpreted the contract in conformity with the natural meaning we assign to it.

Our holding that the contract did not provide for a closed-shop largely undermines the foundation for the Board's contention that the contractual provision giving Union foremen hiring authority was, *per se*, an unlawful attempt to maintain closed-shop and Union-controlled hiring practices. The foremen, under the contract at least, were not subject to the conflicting obligations of two masters. Regardless of

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tive, notifies the other party in writing that a meeting is desired and shall proceed forthwith to settle any questions before it. Such decision to be final and binding on both parties to this contract."

Section 33-a provides that the Joint Standing Committee shall be composed of four members; two members to be named by the Publisher, and two members by the Union.

Section 33-c provides for a Board of Arbitration, in case of a deadlock in the Joint Standing Committee, said Board to be composed of the Committee and a fifth, disinterested party.

[15] See fn. 7, *supra*.

the Union obligations to which, without more,[16] a foreman would be subject by reason of his Union membership. Section 20-c of the contract specifically provides that: "The Union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement." Furthermore, Section 4 provides: " * * * Foremen * * * shall be appointed and may be removed by the Publishers." By these provisions the parties clearly indicated that the foreman are *solely* the employers' agents and that they are under an obligation to act in accordance with the agreement, in spite of Union ties and obligations which otherwise might control. See *Evening Star Newspaper Co. v. Columbia Typographical Union*, 141 F. Supp. 374, aff'd D. C. Cir., 233 F. 2d 697; cf. *Evans v. International Typographical Union, supra*, at 683-684. In any event, there is no presumption of law, we hold, that under the terms of this contract a foreman would be guided by his Union obligations rather than those expressed in the collective bargaining agreement between his employer and the Union. *Honolulu Star Bulletin v. N. L. R. B., supra; Carpenters District Council, Etc. v. N. L. R. B.*, D. C. Cir., 274 F. 2d 564.

Of course, few would doubt that in practice Union foremen could discriminate against nonunion applicants in the exercise of their hiring power. But a mere power to discriminate is not illegal as even the Board appears to recognize. See *Evans v. International Typographical Union, supra*, at 684-685; cf. *Chicago Rawhide Mfg. Co. v. N. L. R. B.*, 7 Cir., 221 F. 2d 165, 170; *Coppus Engineering Corp. v. N. L. R. B.*, 1 Cir., 240 F. 2d 564, 572, 574. Indeed, such recognition is implicit in the Board's order which prohibits the News and the Union from requiring mail room foremen to be Union members *only until such foremen are directly advised by the Union* that they can disregard those provisions of the General Laws which call for closed-shop con-

[16] See fn. 3, *supra*.

ditions and preferential Union hiring. In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives. *N. L. R. B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con., supra,* at 431, cf. *N. L. R. B.* v. *Revere Metal Art Co., Inc., etc.,* 2 Cir., May 6, 1950, —— F. 2d ——.

Nor can we sustain the Board's finding that irrespective of the closed-shop provisions of the General Laws and the foreman's obligation to follow them, his hiring authority, in fact, vested the Union with exclusive control over hiring. The Board's so-called *Mountain Pacific* doctrine even if sound is not applicable here.[17] For the News, not unlike numerous other employers, merely placed its hiring powers in the hands of its principal employee, the foreman who discharged that responsibility on the employer's premises. The News, like any other employer, is of course entitled to employ only Union foremen, if it so desires. Section 2(3) & (11), 14(a) of the Act, 29 U. S. C. §§ 152(3) & (11), 164 (a); *Carpenters District Council, Etc.* v. *N. L. R. B., supra;* cf. *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Ass'n,* 2 Cir., 250 F. 2d 332. But, as we have already noted, the foreman's prime allegiance and responsibility was owed to his employer and to the terms of the collective bargaining agreement. We are unable to discover any reasonable ground of support for the conclusion that these hiring conditions would lead an employee to legitimately assume, regardless of the actual operations of the arrangement, that his employment opportunities depended upon his Union membership.

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[17] *N. L. R. B.* v. *Mountain Pacific Chapter of Assoc. Gen. Con., supra; N. L. R. B.* v. *Swinerton & Walberg Co.,* 9 Cir., 202 F. 2d 511, cert. denied 346 U. S. 814; *N. L. R. B.* v. *International Association of Heat and Frost Insulators, etc.,* 1 Cir., 261 F. 2d 347; *Eichleay Corp.* v. *N. L. R. B.,* 3 Cir., 206 F. 2d 799; cf. *Morrison-Knudsen Company, Inc., etc.* v. *N. L. R. B.,* 2 Cir., March 2, 1960, —— F. 2d ——.

We conclude, accordingly, that the parties did not violate the Act by the mere execution and the maintenance of the collective bargaining contract.[18]

The Board also found that quite apart from the supposed illegality of the contract the respondents had in practice maintained and enforced closed-shop and preferential hiring conditions at the News and Journal through their apprenticeship and competency systems, which we will presently describe. The essence of its position is that respondent maintained a system whereby only Union members could obtain permanent mail room employment, and whereby such members were favored over nonmembers in the "shape-up" hiring for other jobs.

The employment practices thus impugned were substantially as follows. Full time employees, known as "regular situation holders," form the bulk of the mail room labor force and they are not required to "shape" for work, i.e., to be hired on a day-to-day basis. The record indicates, without apparent exception, that such employees are all both journeymen and Union members, although, for aught that appears, their Union membership antedated the passage of the Taft-Hartley Act. The foreman frequently exercises his hiring authority in order to both provide replacements for absent regular situation holders and increase the labor force when increases are needed. The first group to which he turns is that composed of men termed "regular substitutes." These men are available daily to supplement the regular work force of any single publisher and although they are not guaranteed five work shifts per week they normally work that often. It appears that each of them is also both a journeyman and a Union member. The Union

[18] Because of our holding herein, we need not pass upon the Union's claim that the Board's concession that the respondents entered into and administered the contract in good faith precludes findings of violations of §§ 8(a)(3) and 8(b)(2). As to this, each side invoked *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17.

"chapel" chairman,[19] maintains a priority list of these regular substitutes, whose priority is determined by the date on which they commence work with a particular employer, and that date is indicated by the deposit of their Union card with the chapel chairman. Regular substitutes are hired by the foreman in the order in which their names appear on this list.

If, as is quite often the case, the size of the day's newspaper requires the employment of additional mailers, the foreman next hires from men who shape the shop "regular situation holders" and "regular substitutes" from other newspapers, in preference to "other extras." The Board describes such "other extras" as "non union shapers" and the Union terms them "casuals without journeyman status." These conflicting descriptions point up the nub of the dispute. The record indicates that many of these "other extras," including the two whose complaints initiated these proceedings, are men engaged in full-time occupations outside the newspaper industry who shape either irregularly or regularly, but at infrequent intervals throughout the week. Thus ostensibly, at least, the hiring procedures are based upon nondiscriminatory contractual criteria, i.e., competency as evidenced by journeyman status, and seniority based upon length of employment as a journeyman with the hiring employer and as a journeyman elsewhere in the industry.[20] And the respondents persuasively contend that thus to accord priority in the hire of extras to men who regularly work for the employer as well as to men who have journeyman status with other employers, is entirely consistent with lawful hiring based upon

[19] The "chapel" chairman is equivalent to a shop steward and each publisher's mail room constitutes a "chapel."

[20] However, the order of hire among regular situation holders and regular substitutes from other papers was first that of men who had not had five days' work that week and next that of men who had already worked five days.

competency and legitimate employee qualifications quite apart from Union membership.

The Board, on the other hand, strongly urges that since outside Union men are always given shaping preference, even if they have never previously worked at the particular hiring shop, as against all nonunion shapers, including those who have shaped at that shop for many years, unlawful discrimination is proved. It insists that the apprenticeship and competency systems are nothing but camouflage to conceal and perpetuate accomplished discrimination. We turn, therefore, to a consideration of these systems.

Two routes were open to a mail room employee who desired to achieve journeyman status—he could either complete an apprentice training program or he could pass a competency examination. While it is true that apprentices were hired by the foreman,[21] as we said above the contract did not place the hiring authority in the Union. Nor does the record indicate any discriminatory practices in the actual hiring of apprentices.[22] Section 20-b of the contract provided that the qualifying examination for prospective journeymen was to be given "by impartial examiners qualified to judge journeymen competency selected by the

[21] We note, however, that while under Section 20-b of the contract the foreman was to hire and discharge all employees, still Section 27-b provided that a Joint Apprenticeship Committee, composed of an equal number of Union and employer representatives, was to have jurisdiction over all provisions affecting apprentices and was to have control over and responsibility for the selection of apprentices.

[22] The record shows that the Union has occasionally requested and received employer permission to shorten the prescribed six-year apprenticeship program. This permission was allegedly given on several occasions when an employer needed additional journeymen. In any event, all apprentices were required to pass the same competency examination as other applicants for journeyman's status, and under Section 27-b of the contract (see fn. 21, *supra*) any question affecting apprentices upon which the Joint Apprenticeship Committee could not agree was subject to arbitration.

parties hereto."[23] The examinations were given, in fact, by a committee composed of Union officials and mail room foremen. The only concrete evidence of the manner in which this testing system operated is the incident which led to the filing of charges by Burton Randall, a nonunion extra at the News.

In the spring of 1956 the News, along with other New York City newspaper publishers, concurred in a Union-initiated plan which contemplated the promotion to "regular substitute" status of those extras (none of whom were apprentices) who had earned 15 vacation credits in 1954 and 1955. Such a vacation credit standing indicated that a man had averaged almost three days' work per week. the Union hoped that its members might perform the increased volume of mail room work which had become available in the New York mail rooms. The News accepted the plan and the proposed objective standard of 15 days' vacation credits, allegedly because is recognized the need for additional "regular substitutes." It reasoned that the prospective selectees, who had demonstrated frequency of employment over a considerable period of time, would add the greatest available regularity, dependability and competency to the regular work force. Approximately sixty nonunion men shaped at the News. Of these thirty-one met the proposed standard and were made regular substitutes after they had each passed the journeyman's competency examination. Thereafter, each of the new regular substitutes was hired prior to Randall, although he had shaped at the News for over ten years, which was longer than thirty of them. Randall's full-time outside occupation prevented him from shaping except on Friday and Saturday evenings but his work on these nights while regular was insufficient to give him the 15 days' vacation credit.

The Board found that as a result of these practices Randall, who continued to shape regularly on Friday and

[23] See fn. 5, *supra*.

Saturday evenings, worked later hours, performed more difficult work, and lost overtime pay. It also found that Randall was denied employment on one Sunday evening, as a result of a Union reprisal against him for his filing of unfair labor practice charges.

We find, however, a dearth of evidence either that a Union journeyman has ever been hired in preference (let alone, an unlawful preference) to a nonunion journeyman,[24] or that the qualifying standards for taking a competency examination are discriminatory. The record is barren of even the slightest hint that there has been discrimination in the conduct of the examinations.[25] Availability, depend-

[24] Record statements by Union foremen that they would always hire "outside union men" in preference to "non-union extras" do not demonstrate discriminatory hiring practice in the absence of evidence that they or the Union ever committed, in fact, any discriminatory act in denying employment to a non-union journeyman. For aught that appears, these were mere predictions of what they would do if the situation ever arose. *Local 553, International Brotherhood of Teamsters* v. *N. L. R. B.*, 2 Cir., 266 F. 2d 552. Furthermore, on the issue of the motivation behind the hiring plan of extras, this testimony, in context, is of scant help, because (1) the expression "outside union men" is continually interchanged with that of "competency" and "journeyman," and (2) due to the lack of nonunion journeymen practically all journeymen were Union members. What is even more important, so "non-union extras" *were journeymen* and *all* "outside union men" *were journeymen.*

[25] The only offered evidence as to the fate which would await a non-union man claiming competency who made application for employment as a journeyman, was Union testimony, here unchallenged, concerning past practices under a substantially identical contract between the Printers' Union, New York Typographical Union, No. 6, and the Publishers Association of New York City. Over fifty nonunion journeymen, claiming competency, were allegedly given the identical competency examination as that given apprentices, and while only twenty-six passed, none of those who failed complained of discrimination. Interestingly enough, all of the successful twenty-six applicants went to work prior to their admission into the Union, and while the Union application of one was rejected he remains at work in the trade. See also *Evans* v. *International Typographical Union, supra,* at 686-687.

ability and regularity of service, as well as mere competency, are valid nondiscriminatory considerations in determining the order of hire. The fact that one applicant is as competent as another, does not mean that the other may not properly be preferred on the basis of his other qualifications. And the fact that those achieving status as new "regular substitutes" subsequently become Union members and even indicated their willingness to do so prior to the adoption of the standard, does not indicate, at least on this record, that the standard, seemingly fair, was discriminatory in its effect. Randall admitted that he would have welcomed the opportunity to become a Union member, and for aught that appears in the record, so would the remaining extras who did not meet the established standard.

We conclude that the record does not warrant a finding that the hiring system in general, or the competency system in particular, by its discrimination against nonunion applicants, encouraged Union membership.

This conclusion disposes of Arrigale's charge against the Union. For that charge was based only on a claim of unlawful discrimination inherent in the hiring system. But Randall also charged, and the Board found, a specific act of discrimination which caused him loss of employment on one Sunday night. Concededly, Randall did not work on the night in question. And we should hesitate to sustain a finding based solely on Randall's contradicted testimony, that the foreman had told him that he had been instructed by the Union president to reduce Randall's standing on the list of casual shapers for that night. But there was more than this in the record. There was direct evidence, not contradicted we think, that Randall had long stood first on the list of casual shapers for Friday and Saturday nights and also on the Sunday night immediately preceding the Sunday night in question when, according to his direct testimony, for the first time several extras were put to

work ahead of him. We cannot say that it would be unreasonable to infer that this abrupt change in his position on the list was due to the fact that he had shortly before filed charges against the respondents, especially in the absence of any other satisfactory explanation for the change. On the whole, we think the finding of discrimination causing Randall loss of one night's employment was sufficiently supported in the record and constituted a violation of §§ 8(a)(4) and 8(b)(2).

We hold, therefore, that we must deny enforcement of the Board's order except so much of it as is based on the finding of unlawful discrimination against Randall which we have just sustained. However, since the exception covers so small a portion of the order, in the interest of clarity we will deny the petition for enforcement *in toto*, and leave it to the Board, if so advised, to enter an order consistent with our opinion. See *Honolulu Star Bulletin* v. *N. L. R. B., supra.*

Order set aside and case remanded.

APPENDIX "B"

Statutory Provisions Involved

Sec. 2. When used in this Act—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and * * * shall not include * * * any individual employed as a supervisor, * * *

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

Sec. 8.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee

with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a).

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: • • •

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Section 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.